# THE JAPANESE SCHOOL SEGREGATION CASE

## NO. 4754

IN THE

# SUPREME COURT

OF THE

STATE OF CALIFORNIA.

KEIKICHI AOKI, by Michitsugu Aoki, his Guardian *ad litem*,

*Petitioner,*

vs.

M. A. DEANE, Principal of Redding Primary School, in the City and County of San Francisco.

*Respondent.*

## RESPONDENT'S BRIEF

WM. G. BURKE, City Attorney,
Attorney for Respondent.

NO. 4754

IN THE

# SUPREME COURT

OF THE

STATE OF CALIFORNIA.

KEIKICHI AOKI, by Michitsugu Aoki, his Guardian *ad litem*,

*Petitioner*,

vs.

M. A. DEANE, Principal of Redding Primary School, in the City and County of San Francisco,

*Respondent.*

## RESPONDENT'S BRIEF

The facts of this case, as shown by the petition and answer, are that the petitioner, a Japanese child of about ten years of age, was born in the Empire of Japan and is a subject thereof and a resident of the City and County of San Francisco for more than six months last past; that Michitsugu Aoki, his guardian *ad litem*, is his father, and that the said father was born in the Empire of Japan, is a naturalized subject of the United States, but is still a subject of the Empire of Japan; that he is a resident of the City and County of San Francisco and has been such resident for more than five years last past. That the said infant petitioner resides at No. 1821 Laguna street, in the City and County of San Francisco, and that the nearest public school to the residence of said infant is the Redding Primary School, situated on Pine street, in said City and County. That the father and guardian *ad litem* of said infant on or about the 17th day of January, 1907, took said

affiant to said Redding Primary School and made application to the respondent, who was then the principal of said school, for the admission of petitioner as a pupil and asking that he be admitted as such to said school. That the respondent, as principal of said school, declined to receive said infant or entertain the application aforesaid, or to admit the said infant as such pupil, on the ground and for the reason that petitioner was a child of Mongolian descent, and that in accordance with the resolution of the Board of Education of the City and County of San Francisco, passed on the 11th day of October, 1906, the said child could not be received in that school, but should be sent to a public school provided by the Board of Education for Chinese, Japanese and Korean children, situated on the south side of Clay street between Powell and Mason streets, in the said City and County of San Francisco, known as and called the Oriental School. The resolution referred to reads as follows:

> "Resolved that in accordance with Article 1, Section 1662 of the School Law of California, principals are hereby directed to send all Chinese, Japanese or Korean children to the Oriental Public School situated on the south side of Clay Street between Powell and Mason Streets, on and after Monday, October 15, 1906."

That prior to said resolution, the said Board of Education of the City and County of San Francisco, had established a separate public school named and called the "Oriental School". That there were in attendance at the several public schools in the City and County of San Francisco at the date of the adoption of said resolution 93 Japanese students, of whom 25 were born in the United States and 68 were born in Japan; that 39 of said Japanese students were between the ages of 16 and 21 years and the remainder were under the age of 16 years. That no separate public school had been established for children of any particular descent or nationality other than the said Oriental School, and that the children of all other parentage, with the exception of Mongolian, Chinese, Japanese and Korean, are not compelled to attend separate schools. That said Oriental School is not inferior in any respect in its provision of teachers, or other competency, or its accommodations, paraphernalia and equipment, or of the character of instruction therein given, to schools of the same grade attended by pupils of other parentage throughout the City and County of San Francisco; that the said Oriental School is situated about 14 blocks from the residence of petitioner, and that the said Redding Primary School is situated about six blocks from his said residence; that many children of English, German, French, Italian and other European parentage are compelled to travel as great a distance to attend school

as the petitioner would be compelled to travel to attend the said Oriental School.

That the United States entered into a treaty with the Empire of Japan which was concluded on November 22, 1894, and said treaty is now in full force and effect; that said treaty provides in Article 1 as follows:

> "Article 1. The citizens or subjects of each of the two High Contracting Parties shall have full liberty to enter, travel or reside in any part of the territories of the other Contracting Party, and shall enjoy full and perfect protection for their persons and property.
>
> They shall have free access to the courts of justice in pursuit and defense of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.
>
> In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation. The citizens or subjects of each of the Contracting Parties shall enjoy in the territories of the other entire liberty of conscience, and, subject to the laws, ordinances, and regulations, shall enjoy the right of private or public exercise of their worship, and also the right of burying their respective countrymen, according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose.
>
> They shall not be compelled, under any pretext whatsoever, to pay any charges or taxes other or higher than those that are, or may be, paid by native citizens or subjects of the most favored nation.
>
> The citizens or subjects of either of the Contracting Parties residing in the territories of the other shall be exempt from all compulsory military service whatsoever, whether in the army, navy, national guard, or militia; from all contributions imposed in lieu of personal service; and from all forced loans or military exactions or contributions.
>
> * * * * * *
>
> Article 2. It is however understood that the stipulations contained in this and the preceding article (1) do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, *police and public security* which

are in force or which may hereafter be enacted in either of the two countries."

The petitioner asks for a writ of mandate directing the respondent to admit the petitioner to said Redding Primary School as a pupil in the fourth grade thereof.

## ARGUMENT.

### I.

The petition should be denied for the reasons:

(1) That the rights and privileges sought by the petitioner are not granted directly or indirectly by the said treaty between the United States and Japan; and

(2) If the said treaty be so construed as to grant the rights and privileges sought it is unconstitutional and nugatory because—(a) it is in excess of the authority given to the President and Senate as a treaty making power; (b) it is repugnant to the fundamental principles of the Government; and (c) it trespasses upon the reserve powers of the several States.

### I.

### THE RIGHTS AND PRIVILEGES SOUGHT BY THE PETITIONER ARE NOT DIRECTLY OR INDIRECTLY GRANTED BY THE SAID TREATY BETWEEN THE UNITED STATES AND JAPAN.

The right of any subject of Japan to obtain an education in the public schools of the several states of this Union is nowhere given, either by express language or by any reasonable construction of any word or sentence in any article of said treaty. The subject matter of education is not mentioned or dealt with throughout the whole of said treaty stipulations. It is simply a treaty of "commerce and navigation". It is so specifically designated, and without exception its several articles deal only with matters incidental to commerce and navigation. It is claimed, however, that inasmuch as Article 1 of the treaty provides:

> "That the citizens or subjects of each of the two Contracting Parties shall have full liberty to enter, travel or *reside* in any part of the territories of the other Contracting Party, and shall enjoy full and perfect protection for their persons and property * * * and in whatever relates to rights of *residence* and travel * * * the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects, or citizens, or subjects, of the most favored nation,"

that the right here sought to attend our public schools is secured by virtue of the right to "*reside*" in any part of the territory of

the United States. The word to "reside" could have no such meaning. From its very context it relates only to the general purposes and objects of the treaty—commerce and navigation. The very broadest interpretation could carry its meaning no further than that the citizens and subjects of each of the contracting parties should enjoy the privileges and rights necessarily incidental to a residence such as the right of protection to person and property, and such other rights as in the nature of our Government is accorded to any person who might have a domicile within our territory.

If it is to be further extended, where are the limitations? If the right to reside carries the right to an education, why not to citizenship? If the right of a foreign subject to reside in this country carries with it the right to attend our public schools, and thus to hold intimate association with our own children, why is he not entitled to intermarry? If the right to reside is to be construed so as to give the rights and privileges here claimed by the petitioner, then it can be said that there are no restrictions or limitations whatsoever upon the word, and when used in a treaty conveys greater rights to foreign subjects than are enjoyed by the citizens of the United States, for a citizen of a sister state could not, being a mere resident of indefinite duration, exercise the right of elective franchise within this state, nor could he attend our public schools, but in consequence of an express provision of the Federal Constitution guaranteeing to citizens of the United States the equal protection of its laws.

It will be observed that the language of the treaty is that:

> "In whatever relates to the rights of residence and travel * * * the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties and rights and shall be subject to no higher imposts or charges in these respects than native citizens or subjects, or citizens or subjects of the most favored nation."

Thus, by the very terms of the treaty itself, the privileges, immunities, liberties and rights relating to the right of residence are limited to the matter of imposts and charges. By no stretch of imagination, and certainly by no reasonable construction, can it be claimed that this treaty confers upon the subjects of Japan a right to enter the public schools of this State, and this seems to be guarded against by the concluding paragraph of Article 2 of the treaty, where it is said that:

> "It is, however, understood that the stipulations contained in this and the preceding Article (1) do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, *police and public security* which are in

force or which may hereafter be enacted in either of the two countries."

II.

BUT IF THE TREATY EXISTING BETWEEN THIS COUNTRY AND JAPAN CAN BE, OR SHOULD BE, SO CONSTRUED AS TO GRANT THE RIGHTS AND PRIVILEGES SOUGHT, IT IS UNCONSTITUTIONAL AND NUGATORY BECAUSE IT IS IN EXCESS OF THE AUTHORITY GIVEN TO THE PRESIDENT AND SENATE AS A TREATY MAKING POWER, IT IS REPUGNANT TO THE FUNDAMENTAL PRINCIPLES OF OUR GOVERNMENT, AND IT TRESPASSES UPON THE RESERVE POWERS OF THE STATES GUARANTEED BY ARTICLE X OF THE FEDERAL CONSTITUTION.

The treaty making power to be exercised by the President and the Senate is created and established by Section 2, Article II, of the Coustitution of the Uuited States, which provides that he (the President) shall have power by and with the advice and consent of the Senate to make treaties provided two-thirds of the Seuators present coucur. Notwithstanding the power thus created is broad and not qualified or limited by express language, nevertheless it has its limitations, and like all other granted powers when the limits are exceeded they become nugatory and of no force and effect.

The Supreme Court of the United States has several times discussed the exteut of the treaty making power and to some degree determined its limitations. It was said iu the case of *Hauenstein* vs. *Lynham*, 100 U. S. 483, while considering the treaty between the United States and the Swiss Confederatiou:

> "We have no doubt that this treaty is within the treaty making power conferred by the Constitution, and it is our duty to give it full effect. We forebear to pursue the topic further. In the able argument before us it was insisted on oue side, and not denied on the other, that if the treaty applies, its efficacy must necessarily be complete. The only point of contention was one of construction. *There are, doubtless, limitations upon this power as there are of all other arising under such instruments, but this is not the proper occasion to consider the subject.*"

In the case of *DeGeofroy* vs. *Riggs*, 133 U. S. 258, Mr. Justice Field, speaking for the court, said:

> "The treaty making power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government, or of its departments, and those arising from the nature of the Government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government, or in that of one of the States, or of a cession of any portion of

the territory of the latter without its consent."

In *People* vs. *Gerke*, 5th Cal., p. 381, the Supreme Court of this State said:

> "The language which grants the powers to make treaties contains no words of limitation. It does not follow that the power is unlimited, it must be subject to the general rule that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the Federal Government would be ineffectual and the reserved rights of the States would be subverted. This principle of construction, as applied not only in reference to the Constitution of the United States, but particularly in the relation of all of the rest of it to the treaty making grant, was recognized both by Mr. Jefferson and John Adams, the two leaders of opposite schools of construction."

Mr. Butler, in his work on the treaty making power, says:

> "After perusing the foregoing chapters, the reader may think he is justified in presuming that the author does not consider that there are any limitations whatever on the treaty making power of the United States either as to the extent to, or subject matter over, which it may be exercised; such, however, is not the case. The fact that the United States is a constitutional government precludes the idea of any absolutely unlimited power existing. The Supreme Court has declared that it must be admitted, as to every power of society over its members, that it is not absolute and unlimited, and this rule applies to the exercise of the treaty making power as it does to every other power vested in the central government. The question is not whether the power is limited or unlimited, but at what point do the limitations begin."

While it is true that it is declared by Article 2 of the Constitution of the United States that treaties are the supreme law of the land the same is said about the Constitution and all the laws passed in pursuance thereof. This expression, "a treaty is the supreme law of the land", has produced much confusion and is misleading. A treaty is of no greater force or dignity than an Act of Congress. They are both supreme as to the States, and the laws thereof, when passed within the scope of constitutional authority. A treaty is but a form of legislation by an independent co-ordinate branch of the government and when that agency exceeds its authority, its action is not binding. An Act of Congress dealing with the same subject matter is of equal potency and if of a subsequent date, abrogates the treaty if in conflict with it. It has so been held in numerous cases.

In the License Cases, 5 Howard 613, Mr. Justice Daniel said:

> "This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications

which the character of the parties to that instrument, and its adaptation to the purposes for which it was created necessarily imply. Every power delegated to the Federal Government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the General Government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers, for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. *A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State.*"

And in discussing the general power of making treaties, Mr. Jefferson said:

"By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty and cannot be otherwise regulated. It must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way."

In the Dispensary Case, 54 Federal Reporter 969, the Court said:

"It is urged in behalf of these complainants that they are Italian subjects, and are protected by the treaty stipulations between Italy and the United States. The language of the treaty on this point is as follows:

" 'Art. 2. The citizens of each of the high contracting parties shall have liberty to travel in the States and territories of the other; to carry on trade, wholesale and retail; to hire and occupy houses and warehouses; to employ agents of their choice, and generally to do anything incident to or necessary for trade upon the same terms as the natives of the country, submitting themselves to the laws there established.

" 'Art. 3. The citizens of each of the high contracting parties shall receive in the States and territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.'

"Under these articles the complainants have the same rights as citizens of the United States. It would be absurd to say that they had greater rights. We have seen that the right to sell intoxicating liquors is not a right inherent in a citizen, and is not one of the privileges of American citizenship; that it is not within the protection of the fourteenth amendment; that it is within the police power. The police power is a right reserved by the States, and has not been delegated to the General Government. In its lawful exercise the States are absolutely sov-

ereign. Such exercise cannot be affected by any treaty stipulations."

But neither a treaty nor Act of Congress, nor any other authority of the Federal Government is of any validity whatsoever if they deal with matters not committed to their charge, or are in excess of the powers committed to the General Government.

As great as is the Government of the United States, it does not possess all the powers of government. It is a Government formed by the States in their sovereign capacity and possesses only those powers delegated to it by the several States composing the Union, and all other powers not so delegated were and are reserved to the States. This is not a theory, but a well recognized principle of our Government and such a declaration forms a part of the Constitution itself.

Article X of the Amendments of the Constitution provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Ever since the adoption of this amendment every State of the Union has been, and they still are, exercising the rights so reserved by them, and while doubts have arisen from time to time as to the extent and character of the rights delegated to the General Government, and to the extent and character of the rights reserved by the States, the principle announced has never been questioned by the strongest adherent of the doctrine of centralization. It forms an essential feature of our republican form of government. The Constitution itself enumerates the powers delegated to it by the States. In addition are certain powers denied to the States; so the powers enumerated and those incidental thereto, together with the powers denied to the States, comprise the whole scope of the powers delegated to the General Government. No attempt has ever been made to designate with precision the extent and character of the reserve powers of the States, and it must follow as a logical sequence as well as by positive constitutional declaration, that all the powers of government not delegated to the General Government, remain with the States or with the People.

There are certain powers the very nature of which place them in the list of reserve powers, or powers reserved to the States,—matters of domestic concern, the internal affairs of the people of the respective States, matters concerning the safety, happiness, morals and general well-being of the people of the respective communities, marriage, divorce, parent, child, etc.

There is also a great body of powers constantly exercised by the several States of the Union under the general appellation of

"police powers". No one would contend that these powers were ever delegated to the General Government, or that they were not reserved by the States.

It was said in the case of *Martin* vs. *Hunter*, 1 Wheaton 304:

> "The Government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted to it must be such as are expressly given, or given by necessary implication."

In License Cases, 5 Howard 524, it is said:

> "It may then be assumed on authority which does not admit of doubt that a State has a right to regulate its internal commerce and to provide for the health and government of its citizens by suitable laws. That such regulations are considered by this Court to be police laws, will not be doubted. See also *Prigg* vs. *Pennsylvania*, 16 Peters 539; *Lake View* vs. *Rose Hill Cemetery*, 70 Ill. 101."

Matters of education fall readily and easily among the police powers of the State. In *Barbier* vs. *Connelly*, 113 U. S. 27, the Supreme Court of the United States said:

> "Neither the amendment (14th amendment to the Constitution), broad and comprehensive as it is, nor any other amendment, was designed to interfere with the powers of the State, sometimes terms its police power, to prescribe regulations, to promote the health, morals, *education*, and good order of the people."

The power, therefore, to regulate and conduct our public schools is among the police powers of the State reserved by them. *It is the most sacred of them. It concerns the well-being, moral, social, and educational, of every family in the land. It is nearer the hearthstone of every household. The teacher is but a substitute for the parent, and the school-house is but an annex to his residence. The parent and the State have a right to be solicitous about the environments of the child, and they have a right to know that no contaminating influences surround it and that its education shall be given under conditions and regulations which afford the best advantages and the best protection.*

Now, as to the case at issue:

The State of California has declared by section 1662 of the Political Code:

> "Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age, residing in the district, and the Board of School Trustees, or said Board of Education, have power to admit adults and children not residing in the district whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, *and also to establish*

*separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese or Mongolian children must not be admitted into any other school.*"

This law is in keeping with the declared policy of the State as set forth in its Constitution. Section 1, Article XIX, provides:

> "That the Legislature shall prescribe all necessary regulations for the protection of the State and the counties, cities, and towns thereof from the burdens and evils arising from the presence of aliens * * * otherwise dangerous or detrimental to the well-being or peace of the State, and to impose conditions upon which such persons may reside in the State. * * *"

Section 4 of the same article of the Constitution provides that:

> "The presence of foreigners, ineligible to become citizens of the United States, is declared to be dangerous to the well-being of the State. * * *"

Under and by virtue of these laws, the Board of Education of the City and County of San Francisco did, on the 6th day of May, 1906, pass and adopt a resolution as follows:

> "Resolved, That the Board of Education is determined in its efforts to effect the establishment of separate schools for Chinese and Japanese pupils, not only for the purpose of relieving the congestion at present prevailing in our schools, but also for the higher end that our children should not be placed in any position where their youthful impressions may be affected by association with pupils of the Mongolian race."

And on the 11th day of October, 1906, the same Board passed and adopted a resolution as follows:

> "Resolved, That in accordance with article 1, section 1662 of the School Law of California, principals are hereby directed to send all Chinese or Korean children to the Oriental Public School situated on the south side of Clay Street, between Powell and Mason Streets, on and after Monday, October 15th, 1906."

Prior to the adoption of said resolution the so-called Oriental School was established. The petitioner, an infant of ten years of age had, prior to October 15th, 1906, attended a public school in the City and County of San Francisco, where children of other parentage than Chinese, Korean, Indian attended, but on January 17th, 1907, in accordance with said resolutions and laws, he was denied admission into any of the public schools of the City and County of San Francisco of the Grammar or Primary Grade, except the said Oriental Public School, established for Chinese, Japanese and Korean children. Being thus denied admission into any other school than the said Oriental School, the petitioner now seeks to enforce such right on the ground that he is so entitled because of

the stipnlations contained in said treaty existing between this Government and the Empire of Japan. The qnestion is then presented—is the establishment of a pnblic school system by the State of California, snpported and sustained by taxation of its own people, a matter of State or Federal concern? Shall our schools be directed and managed by the anthorities of the State under State laws, or by the authority of the General Government under *treaty* stipnlations? Is our pnblic school system snpported and snstained by the taxation of our people for *their children*, or for the benefit of the children subjects of foreign conntries? Being a matter only of domestic concern and within the scope of the police powers of the State, we contend that the right and power to regulate and conduct our pnblic schools belong wholly to onr State, and any attempt on the part of the Federal Government, or on the treaty making power, to interfere with snch regulation and condnct is not only in excess of the powers of either the General Government, or the treaty making power, bnt is snbversive of the well-being and safety of the people of the State of California.

This case is without precedent. Never before has any attempt been made to enforce a right of this character through treaty stipulations on behalf of foreign subjects. Efforts have been repeatedly made on the part of citizens of the United States to defeat legislation by the States establishing separate schools for persons of the colored race. Several of the States of the Union have enacted statntes and they are still now in fnll force and effect, establishing separate schools for negro children, and the right to so establish such schools has been challenged on the ground that snch legislation was in conflict with the fonrteenth amendment to the Constitution of the United States, guaranteeing to its citizens equal privileges, rights and immnnities, and the equal protection of the laws.

One of the earliest of these cases is that of *Roberts* vs. *City of Boston*, 5th Cnsh. 198, in which Chief Justice Shaw said:

> "The great principle advanced by the learned and eloquent advocate for the plaintiff (Mr. Charles Snmner) is that by the constitution and the laws of Massachnsetts, all persons without distinction, age or sex, birth or color, origin or condition, are eqnal before the law, * * * but when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and to be subject to the same treatment, but only that the rights of all as they are settled and regulated by law are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

It was held in this case that the establishment of separate schools for children of different ages, sexes and colors was legally and properly done.

Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia. (Sections 281, 283, 310 and 319, Revised Statutes, D. C.) The legislatures of many of the States have passed laws providing for the establishment of separate schools for negro children, and such have been generally sustained by the courts.

*State* vs. *McCann*, 21 Ohio St. 210.
*Lehew* vs. *Brummel*, Mo. 15 S. W. 765.
*Ward* vs. *Flood*, 48 Cal. 36.
*Burtoneau* vs. *Directors of City Schools*, 3 Woods 177. Federal Cases, No. 1361.
*People* vs. *Gallagher*, 93 N. Y. 438.
*Corey* vs. *Carter*, 40 Ind. 337.
*Dawson* vs. *Lee*, 83 Ky. 49.

In the case of the *People* vs. *Gallagher*, 93 New York 438, it was said:

> "The school authorities have power, when in their opinion the interests of education will be promoted thereby, to establish schools for the exclusive use of colored children, and when such schools are established and provided with equal facilities for education, they may exclude colored children from the schools provided for the whites. The establishment of such separate schools for the exclusive use of the different races is not an abridgment of the privileges or immunities preserved by the 14th Amendment of the Federal Constitution, nor is such a separation a denial of the equal protection of the laws given to every citizen by said Amendment. It seems that the privileges and immunities which are protected by said Amendment are those only which belong to the state as a state of the United States. Those which are granted by a state to its citizens which depend solely upon state laws for their origin and support are not within the constitutional inhibition and may lawfully be denied to any class or race by the state at its will and discretion. It seems also that as the privilege of receiving an education at the expense of the state is created and conferred only by state laws, it may be granted or refused to any individual or class at the pleasure of the state."

Subsequently, in the case of *People* vs. *School Board*, 161 N. Y. Appellate Decisions 469, Court of Appeals, the case of *People* vs. *Gallagher, supra*, was confirmed, the Court saying:

> "If the Legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the Constitution to deprive it of the right so to provide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such

education was being obtained. In this case there is no claim that the relator's children (colored children) were excluded from the common schools of the borough, but the claim is that they were excluded from one or more particular schools which they desired to attend, and that they possessed the legal right to attend those schools, although they were given equal conditions and advantages in another and separate school. We find nothing in the Constitution which deprived the School Board of the proper management of the schools in its charge or from determining where different classes of pupils should be educated, always providing, however, that the conditions and facilities were equal for all. Nor is there anything in this provision of the Constitution which preveuted the Legislature from exercising its discretion as to the best method of educating the different classes of children in the state whether it relates to separate classes as determined by nationality, color or ability, so long as it provides for all alike in the character and extent of the education which it furnished and the facilities for its acquirement."

In the case of *Wong Him* vs. *Callahan*, 119 Federal Reporter 381, the Political Code of California, section 1662, was considered, aud it was there held that the separate schools established by the trustees for the children of Mongolian descent was uot in violation of the Fourteeuth Amendment to the Constitution, it appearing that the schools so established offered the same advantages as the other schools.

In the case of *Lehew vs. Brummel*, decided March 9th, 1899, by the Supreme Court of the State of Missouri, speakiug of the provision of the Fourteenth Amendment prohibiting the States from making or enforcing any law which shall abridge the privileges or immuuities of a citizen of the United States, and that no State shall deny to any person within its jurisdiction the equal protection of the laws, the Court says:

"The common school system of this state is a creature of the state constitution and the laws passed pursuant to its command. The right of children to attend the public schools and of parents to send their children to them is not a privilege or immunity belonging to a citizen of the United States as such. It is a right created by the state and a right belonging to citizens of this state as such. It therefore follows that the clause in question is without application to the acts in hand. We then come to the simple question whether our Constitution and the statutes passed pursuant to it requiring persons to attend schools established anl maintained at public expense for the education of colored persons only denied to such persons equal protection of the laws. It is to be observed, in the first place, that these persons are not denied the advautages of the public schools. The right to attend such schools aud receive instruction thereat is guaranteed to them. The framers of the Consti-

tution and the people by their votes in adopting it, it is true, were of the opinion that it would be well to establish and maintain separate schools for colored children. The wisdom of the provision is no longer a matter of speculation. Under it the colored children of the state have made a rapid stride in the way of education, to the great gratification of every right-minded man. * * * But it will be said the qualification now in question is one based on color, and so it is, but the color carries with it race peculiarities which furnish the reason for the exclusion. There are differences in races and between individuals of the same race not created by human laws, some of which can never be eradicated. These differences create different social relations recognized by all well organized governments. If we cast aside chimerical theories and look to practical results it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage. * * * The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is but a reasonable regulation of the exercise of the right, as said in the case just cited—(*People* vs. *Gallagher*, *supra*) equality, and not identity of privileges and rights is what is guaranteed to the citizen. Our conclusion is, that the constitution and laws of this state providing for separate schools for colored children are not forbidden by or in conflict with the 14th Amendment of the Federal Constitution."

The Supreme Court of the United States, in the case of *Plessy* vs. *Ferguson* (Supreme Court Reports, Volume 16, page 1138), had before it the question of the constitutionality of an Act of the General Assembly of the State of Louisiana, providing for separate railway carriages for the white and colored races, and in the discussion and determination of that question, had occasion to review almost all the cases from the several States respecting the rights and powers of the States to enact legislation establishing separate schools for the white and colored races, and whether or not such legislation was in conflict with the Fourteenth Amendment of the Federal Constitution. The Court said:

"The object of the Amendment (14th Amendment) was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or the commingling of the two races upon terms unsatisfactory to either. Laws permitting and even requiring their separation in places where they are liable to be brought in contact do not necessarily imply the inferiority of either race to the other, and have been generally if not universally recognized as within the competency of the state legislature in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children which have been held to be a valid exercise of the

legislative power even by states where the political rights of the colored race have been longest and most earnestly enforced."

After a review of all the cases upon the subject, the Supreme Court of the Uuited States held the Act of the State of Louisiana to be valid.

It will be remembered that Congress passed an Act called the "Civil Rights Bill" entitling all persons to the full and equal enjoyment of conditions, advautages and privileges of inns, public conveyauces, theaters aud other places of public amusement, aud specifically made the Act applicable to citizens of every race and color, regardless of any previous condition of servitude. This Act was declared unconstitutional and void upon the ground that the Fourteeuth Amendment was prohibitory upon the States only and the legislation authorized to be adopted by Cougress for enforcing it was not direct legislation on matters respectiug which the States were prohibited from making or enforcing certaiu laws or doing certain acts, but was corrective legislatiou. In deliveriug the opinion of the Court in this case (109 U. S., page 3), Mr. Justice Bradley said that the Fourteenth Amendment

"does not invest Congress with power to legislate upon subjects that are within the domain of state legislation or state action of the kind referred to."

The Supreme Court further said in the case of *Plessy* vs. *Ferguson*, *supra:*

"We consider the underlying fallacy of the plaiutiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with the badge of inferiority. If this be so. it is not by reason of auything found in the Act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case and is not uulikely to be so again, the colored race should become a dominaut power in the state legislature and should euact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race at least would not acquiesce iu this assumption. The argument also assumes that social prejudice may be overcome by legislation and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of equality it must be that the result of natural affiuities aud mutual appreciation of each other's merits and a voluntary cousent of individuals."

The Court then quotes with approval what was said iu the case of *People* vs. *Gallagher; supra*:

"This end can never be accomplished nor promoted by laws which conflict with the general sentiment of the community

upon whom they are designed to operate. When the Government therefore has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all the functions respecting social advantages for which it was endowed,"

and then concludes:

"*Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical difference and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other, civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.*"

The doctrine so clearly enunciated in these cases, beginning with the highest courts of the States, and ending with the approval by the highest court of the nation, fully justifies our State legislation in the matter of the establishment of separate schools for Orientals.

It must be borne in mind that the rights asserted by colored children to attend the public schools without segregation into separate schools, were rights claimed by them *under the Constitution of the United States*, and *as citizens of the United States, and as citizens of the respective States.*

IF NO SUCH RIGHTS ARE GUARANTEED TO THEM UNDER THE CONSTITUTION AS CITIZENS OF THE UNITED STATES AND OF THE STATES, CAN IT BE SAID THAT GREATER RIGHTS ARE ACCORDED SUBJECTS OF A FOREIGN COUNTRY UNDER A TREATY THAN CAN BE ACCORDED TO CITIZENS OF THE UNITED STATES UNDER THE SHELTERING FOLDS OF THEIR OWN FLAG AND THE CONSTITUTION OF THEIR OWN COUNTRY?

Is the treaty making power a government unto itself with power to abrogate all other rights and powers established by the Constitution? Is it supreme as to the Constitution itself and all other agencies acting under and by authority of the Constitution? Has the President, with two-thirds of the Senate concurring, such plenary power that by a treaty they may destroy all rights guaranteed by the Constitution? If so, the whole fabric of our governmental institutions may be destroyed, and the reserved rights of the States so essential to the safety and well-being of the people are gone forever, and we become wholly subservient to the autocratic and arbitrary power of any self-willed Executive.

---

So far, I have not touched upon the three other other points urged by the petition:

(1) That the petitioner is not a Mongolian;

(2) That he is subjected to inconvenience and hardship by being compelled to travel a great distance (fourteen blocks) to attend the Oriental School;

(3) That the United States Government has furnished by appropriations and land grants a large sum of money to aid in defraying the expenses of the public schools of this State, and that such appropriations were made with the intent and understanding that the public schools should be conducted under treaties which might be made between the United States and any foreign country.

I believe that the questions here involved will be determined from a consideration of the more important points urged and heretofore more fully discussed in this brief, and it is not necessary at this time to say more respecting the first point than that the Japanese are of Mongolian descent within the meaning of the laws of our State. They certainly belong to the class designated "Mongolian" by ethnologists and historians in classifying the distinct families or races of the earth.

Whether or not the petitioner has been subjected to any hardships or inconveniences by being compelled to travel a distance of fourteen blocks from his residence to attend the Oriental School is not important. Under any system, inequalities in that regard might and do arise. What was said in the case of *Lehew* vs. *Brummel, supra*, is pertinent. It was said in that case that:

> "It is true Brummel's children (colored children) must go three and one-half miles to reach a colored school, while no white child in the district is required to go further than two miles. The distance which these children must go to reach a colored school is a matter of inconvenience to them, but it is an inconvenience which must arise in any school system. The law does not undertake to establish a school within a given distance of anyone, white or black. The inequality of distances to be traveled by the children of different families is but an incident of any classification and furnishes no substantial ground of complaint."

It appears also from the answer filed in this case, that many white children are subjected to the same character of hardship or inconvenience as complained of by the petitioner. It must be conceded that if such inconvenience exists as complained of, it cannot be urged against the validity of any law or ordinance passed by the Board of Education charged with the duty of regulating, conducting and managing public schools of this City and County.

It is true that the Federal Government has furnished a large amount of money and has made large grants of land for the use and benefit of our public schools. The exact amount of such appro-

priations cannot be now stated, but by comparison with the amount of money raised by general taxation of the property of the people of this State, the sum would be insignificant. It may be that the Government of the United States, by such appropriations, has contributed a few millions of dollars for this purpose since California became a member of the Union. But from such data as we have at hand, it would appear that the people of the State of California have, by general taxation, contributed not less than $150,000,000 for the support of their public schools. In the grants of land made by the Federal Government, and in the appropriations of money for the use and benefit of our public schools, I have been unable to find any stipulations or conditions attached to those grants and there is no authority for the statement that it was the intent of the General Government when making said appropriations that the General Government, either by Act of Congress or by treaty, reserved to itself the right to conduct and manage our public schools because of such appropriations. If such were true, then it would become a case of "Beware of the Greeks when they come bearing gifts".

It is respectfully submitted that the petition should be denied.

WM. G. BURKE, City Attorney,
Attorney for Respondent.